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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. ISAIAH N. WASHINGTON et al., Defendant and Appellant.	A146433 (Alameda County Super. Ct. Nos. CH53084A, CH53084B)

Appellants Isaiah Washington and Tiara Arnold (appellants) were convicted of two counts of murder and one count of attempted murder. On appeal, they assert numerous claims of error. Although we conclude the trial court erred in certain respects, and as to another issue assume error for purposes of this decision, the errors were not prejudicial. We do remand for the trial court to exercise its discretion to strike three firearm enhancements imposed on Arnold.

PROCEDURAL BACKGROUND

In December 2012, the District Attorney of Alameda County filed an information charging appellants with the murders of Carlos Buenrostro and Rafael Avila (counts one and two; Pen. Code § 187, subd. (a)),[1] and the attempted murder of Joslyn Medellin[2]

[1] All undesignated statutory references are to the Penal Code.
[2] Medellin was identified as Jane Doe in the information.

(count three; §§ 187, subd. (a) & 664, subd. (a)). Washington was charged with possession of a firearm by a felon (count four; § 12022.1).

The information alleged as special circumstances that appellants committed more than one murder (§ 190.2, subd. (a)(3)) and that appellants committed the murders while committing a robbery (§ 190.2, subd. (a)(17)(A)). Regarding counts one through three, the information alleged appellants personally used firearms (§§ 12022.5, subd. (a) & 12022.53, subds. (b) and (g)). Regarding count 3, the information further alleged Arnold personally and intentionally discharged a firearm (§ 12022.53, subd. (c)).

In March 2015, a jury convicted appellants on all counts. The jury found the murders in counts one and two were of the first degree, and found true the special circumstance and firearm use allegations.

In September 2015, the trial court sentenced appellant Washington to prison for two consecutive terms of life without the possibility of parole. The court imposed concurrent sentences for the attempted murder and the illegal firearm possession. The court sentenced appellant Arnold to a total term of 95 years to life, comprised of consecutive terms of 25 years to life on counts one and two;[3] consecutive ten-year enhancements on counts one and two under section 12022.53, subdivision (b); a consecutive five-year term on count three; and a consecutive 20-year enhancement on count three under section 12022.53, subdivision (c).

FACTUAL BACKGROUND

Joslyn Medellin

The victim of the attempted murder, Joslyn Medellin, was the primary witness to the underlying events. She was sixteen years old in May 2010. She testified she was a friend and schoolmate of Arnold, who invited her to attend a May 8, 2010 welcome-home

[3] Although the jury found the murder special circumstances true, the trial court exercised its discretion to sentence Arnold, a juvenile at the time of the offenses, to sentences of 25 years to life instead of sentences of life without the possibility of parole. (See *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1371.)

barbecue for Arnold's boyfriend, Washington, who had recently been released from jail. In the early evening, Arnold picked up Medellin at the South Hayward BART station; Arnold was driving her green car. They met Washington at his home in Oakland and drove around in another car, eventually buying tequila and then returning to Washington's home.

Medellin realized there would be no party and said she wanted to go home. Washington appeared to want Medellin to spend the night with him, but appellants eventually agreed to take Medellin home. Arnold and Medellin got into Arnold's car and, after about ten minutes, Washington approached the car holding a rifle. Washington sat in the driver's seat and handed the rifle to Arnold, who was in the front passenger seat. Washington repeatedly said in an "evil" tone of voice that he would drop off Medellin at her mother's house dead.

Washington eventually drove toward Hayward on Interstate 880. Washington stopped on Westpark Street in Hayward. A white car was across the street. Appellants got out and Washington told Medellin, "Get the fuck out of the car."

Appellants walked toward the white car; the murder victims Avila and Buenrostro were standing by the car. Washington ordered the victims to lie on the ground. He then told Arnold to check their pockets and the inside of their car. Arnold repeatedly touched the car with her hands and Washington pointed the rifle at her and said, "You're putting your prints on the car." Arnold screamed, "Stop pointing the fucking gun at me." They argued.

Subsequently, Arnold kicked one of the victims, who said, "Stop kicking me." Next, Arnold "end[ed] up having the gun," and a "few seconds" later Medellin heard gunshots. Medellin was looking at the victims when they were shot. At trial, Medellin testified on direct and on Washington's cross-examination that Arnold was the last person holding the gun before the gunshots, but on Arnold's cross-examination she said she did not know who had the gun and admitted testifying at the preliminary hearing that Washington had the gun before she heard the gunshots.

When the firing stopped, Medellin heard Washington say, "Shoot that bitch." Medellin ran, and she heard gunshots and felt bullets in the air. She dropped her phone, but managed to escape.[4]

Other Evidence

After midnight on May 8, 2010, Ronita Nair and friends were driving in the area of Westpark Street in Hayward. As they turned onto Westpark Street, Nair saw two people face down on the ground. Nair also saw a man walking toward her vehicle and a woman next to a white car. She identified appellants as the man and woman she saw. As she turned onto another street, she heard gunshots.

Police officers arrived at the scene of the shooting at 1:10 a.m. on May 9, 2010. Victim Avila was lying dead next to the white car. Victim Buenrostro was on the sidewalk. He was gravely wounded, and he said, "They shot me and took my money." A forensic pathologist said both victims died of multiple gunshot wounds. Buenrostro had abrasions consistent with having been kicked while he was on the ground. Medellin's cell phone was found in the area of the shooting.

Police officers observed Arnold's green car at a traffic light; Arnold and Washington were arguing in the car. Washington, who was driving, ran a red light and drove away at high speed. The police followed but appellants escaped through some illegal and dangerous maneuvers. At around 1:30 a.m., the police found the car abandoned and arrested Arnold nearby. She was taken to be identified by Nair. Washington was arrested several hours later. Later in the morning on May 9, 2010, Arnold was interrogated at the Hayward Police Department. She denied involvement in the shooting and claimed she had been the victim of a carjacking.[5]

The parties stipulated Washington had been convicted of robbery on September 1, 2009. They also stipulated gunshot residue testing was done on appellants' shirts, presumably those worn at the time of arrest. The results were positive, indicating that the

[4] We describe Medellin's police interrogation in Part I, *post*.
[5] We provide more details about the interrogation in Part II, *post*.

wearer had been close to a firearm when it was fired, or the clothing had rubbed up against something that had residue on it.[6] A sample taken from Washington's hands at 7:25 a.m. on May 9, 2010 contained gunshot residue. No residue was found on a sample collected from Arnold's hands at 9:57 a.m., although Arnold had washed her hands when she went to the bathroom while in custody.

DISCUSSION

I. *The Trial Court Did Not Err in Failing to Exclude Medellin's Testimony*

Appellant Washington, in an argument joined by appellant Arnold, contends the trial testimony of Joslyn Medellin "should have been excluded as having been procured by coercive police interrogation tactics." The trial court rejected the claim, concluding both that the statements Medellin made to the police in 2010 were not coerced and there was no indication any trial testimony would result from coercion. Assuming the 2010 statements were coerced, the trial court did not err in concluding there was no basis to exclude the statements at trial.

Washington argues Medellin's 2015 trial testimony should have been excluded because police officers used coercive tactics in questioning her in 2010 about the May 9, 2010 murders. In particular, Inspector Kendell Won learned on May 14 that Medellin had been injured in an apparent drive-by shooting. Won knew Medellin's cell phone had been recovered from the May 9 murder scene, and he and another officer went to the hospital to interview Medellin. They questioned her while she was on a gurney in the emergency room, in the hospital after surgery, and at her home on two different days. She claimed she had innocently walked by the scene of the robbery while visiting her boyfriend and she had been shot at when she ran. She did not admit to being with appellants until a May 19 interview at her home. Washington contends the detectives "put extreme pressure on Ms. Medellin to implicate" appellants by telling her that she

[6] The prosecution presented other physical evidence and evidence of phone calls between appellants while Washington was in jail, but it is unnecessary to summarize that additional, incriminating evidence.

and her family were in danger from appellants. Washington claims the warning was false because the officers had no evidence Medellin was in danger from appellants; he notes Medellin said she saw the drive-by shooters and believed it was an unrelated incident.

Even assuming Medellin's 2010 statements were coerced, Washington has shown no basis to exclude her trial testimony. "In determining whether a [statement] was voluntary, ' "[t]he question is whether defendant's choice . . . was not 'essentially free' because his [or her] will was overborne." ' [Citation.] Whether the [statement] was voluntary depends upon the totality of the circumstances. [Citations.] ' "On appeal, . . . the trial court's finding as to the voluntariness of the [statement] is subject to independent review." ' " (*People v. Carrington* (2009) 47 Cal.4th 145, 169.) "[T]he primary purpose of excluding coerced testimony of third parties is to assure the reliability of the trial proceedings. . . . 'Because the exclusion is based on the idea that coerced testimony is *inherently unreliable*, and that its admission therefore violates a defendant's right to a fair trial, this exclusion necessarily focuses only on whether the evidence actually admitted was coerced. . . . [D]efendant can prevail on his suppression claim only if he can show that the trial testimony given by [the third party] was involuntary at the time it was given.' " (*People v. Badgett* (1995) 10 Cal.4th 330, 347; see also *People v. Williams* (2010) 49 Cal.4th 405, 453 ["Although the out-of-court statement itself may be subject to exclusion because coercion rendered it unreliable, it is more difficult for a defendant to establish that the court should exclude the witness's *trial testimony*."].) "The burden rests upon the defendant to demonstrate how the earlier coercion 'directly impaired the free and voluntary nature of the anticipated testimony in the trial itself' [citation] and impaired the reliability of the trial testimony." (*Williams*, at p. 453.)

In the present case, Washington makes almost no effort to show Medellin's trial testimony was coerced. His opening brief on appeal discusses exclusively the circumstances surrounding the 2010 questioning of Medellin and provides no explanation why those circumstances rendered the 2015 trial testimony involuntary. In his reply brief, Washington merely asserts, "the coercive effect of this intimidation tactic did indeed continue up to the time of trial, because the implication of the officers' dire

warnings was that, unless the defendants were convicted, which depended heavily on Medellin's testimony, she and her family would face an ongoing danger, continuing through the time of trial and beyond." That assertion is pure speculation, not based on any statements by either the police or Medellin in the five years between 2010 to 2015. Neither does Washington point to anything in Medellin's trial testimony that suggests she was still under the influence of the detectives' statements made five years earlier.

Because Washington failed to meet his burden of demonstrating "how the earlier coercion 'directly impaired the free and voluntary nature of' " the trial testimony (*People v. Williams*, *supra*, 49 Cal.4th at p. 453), his claim fails.

II. *No Prejudicial Error in Admission of Arnold's Police Interview*

Appellant Arnold argues the trial court violated her rights under the Fifth Amendment to the federal Constitution because it failed to suppress aspects of her police interview. First, she contends the court should have granted her motion to suppress her answer to questioning about whether she had recently washed her hands, because she had not yet been given the advisements required by *Miranda v. Arizona* (1966) 384 U.S. 436. Second, she contends the court should have suppressed all portions of the interview following her declaration that she "don't wanna talk no more." We conclude any errors were harmless beyond a reasonable doubt. (*People v. Elizalde* (2015) 61 Cal.4th 523, 542.)

A. *Factual Background*

Police Inspector Greg Velasquez and Detective Guy Jakub interviewed appellant Arnold at the Hayward Police Station about eight hours after her arrest on May 9, 2010. At the beginning of the interview, before advising Arnold pursuant to *Miranda*, the officers collected a sample from her hands for a gunshot residue analysis. They asked her several questions in the collection process, including whether she had "washed her hands recently." She said she did "when officers took me to the bathroom."

Subsequently, Velasquez informed Arnold of her *Miranda* rights. She did not decline to speak to the officers or request counsel, and the officers proceeded to question her regarding her whereabouts the night before. She said that two males wearing black

masks and carrying guns had carjacked her and a friend named Andrea in East Oakland. She ran away from the carjackers and hid until the police found her. She could not provide any contact information for Andrea. She denied any involvement in a shooting.

The officers continued to press Arnold on the veracity of her story, and she eventually stated, "I really don't wanna talk no more." Velasquez asked her another question without acknowledging her statement and Arnold again stated, "I don't wanna talk no more." Velasquez asked, "You don't want to talk no more?" Arnold shook her head. Velasquez said, "I just want to find out where the gun is at." When Arnold again denied any knowledge, the officers left.

The officers returned after about 15 minutes and handed Arnold a cell phone with her mother on the line. After Arnold spoke with her mother, the officers returned, said they had received details from her mother, and continued to interrogate her about the shooting.

The trial court denied Arnold's motion to exclude her statement that she had washed her hands, concluding the inspector's question about hand washing was a "booking-type" question "designed to give the officer some information that they may need to do some further investigation." The court also denied Arnold's motion to exclude her statements after she told the inspectors she did not want to talk any more, concluding Arnold had not "unequivocally and unambiguously" invoked her right to remain silent. The court observed, "there was a little bit of back and forth going on here. Miss Arnold, I don't think, can be characterized. She's no wallflower. She's not just sitting there like a potted plant, . . . she gets into it."

Neither the video recording nor the transcript of the Arnold interview were admitted into evidence. Instead, Jakub testified at trial about the interrogation and a small portion of the video was played for the jury. Among other things, Jakub testified Arnold was asked whether she washed her hands and she said "[s]he had washed her hands while in the custody of other officers out in Oakland" when she used the bathroom. He also said on cross-examination by Arnold's counsel that they allowed her to use the restroom before questioning her. Regarding Arnold's demeanor, Jakub testified she was

"very mature," "very sophisticated," and "came off cocky several times during the interview." He also said she laughed shortly after the phone call and did not seem nervous or scared. During cross-examination by Washington's counsel, Jakub explained that at various points in the interview Arnold would respond with "a sarcastic-type laugh, laughing off our questions and telling us that the information we were trying to tell her is not true."

Jakub also said Arnold "continued to ask for the names of the people that . . . apparently saw her and continued to question our questions with questions and continued to give a fabricated story as far as what happened that night." Specifically, Arnold claimed she had been carjacked with a friend named Andrea, but she could not give the police any contact information for Andrea. Arnold also claimed she did not have a phone, even though there were phone records of her texting others. She claimed she "had never held a gun in her life," even though the police found a photo of her holding a semi-automatic pistol. (See Part III, *post*.) Jakub also testified Arnold tried to "grab some papers out of [Velasquez's] hands and [Velasquez] has to pull them back and kind of admonish her . . . ."

The prosecutor also played a four-minute clip from Arnold's interrogation, during which she spoke to her mother on the phone in the interrogation room, repeating the carjacking story and denying involvement in the shooting. She also claimed, "I ain't never seen a gun in my life."

B. *Analysis*

"In order to protect the exercise of the privilege against self-incrimination, the United States Supreme Court has declared that persons subject to custodial interrogation must be informed of certain rights, including the right to counsel, and that once such a person invokes the right to counsel, the police must cease interrogation until counsel is provided or the suspect initiates further contact and makes it clear that he or she wishes to proceed without counsel." (*People v. Peevy* (1998) 17 Cal.4th 1184, 1187–1188 [citing *Miranda* and other cases].) "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during

questioning, that he wishes to remain silent, the interrogation must cease." (*Miranda*, *supra*, at pp. 473–474.)

We first address Arnold's claim the trial court should have excluded her answer to the question whether she washed her hands. "[T]he term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." (*Rhode Island v. Innis* (1980) 446 U.S. 291, 300–301, fn. omitted.) Arnold argues Velasquez should have known the question was reasonably likely to elicit an incriminating response because he "should have well known that an admission from [Arnold] that she had washed her hands before the police could obtain a gunshot residue sample from her would be used against her at trial as consciousness of guilt evidence." We need not decide in the present case whether the question constituted interrogation. Even if the question was one an officer should know is likely to produce an incriminating response, Arnold's response was not actually incriminating. She said she washed her hands after the police took her to the bathroom, which was a normal thing to do. Arnold was in custody for about eight hours before being questioned, and it would have been surprising if she had not used the bathroom and washed her hands during that period. There is no indication she was told not to wash her hands, there was nothing suspicious in her tone when she said she washed her hands, and the police officers did not react with alarm upon learning she had washed her hands. Contrary to Arnold's suggestion on appeal, the answer did not suggest a consciousness of guilt, because both guilty and innocent suspects wash their hands after using the bathroom. Any error in allowing Jakub to testify about her response to the handwashing question was harmless beyond a reasonable doubt.

Next, we consider the trial court's failure to exclude portions of her interrogation after she said she did not want to talk anymore. We agree Arnold unambiguously invoked her right to remain silent by stating twice in the course of 15 seconds that she did not want to talk anymore and by shaking her head in response to officer Velasquez's

question, "You don't wanna talk no more?" (See, e.g., *People v. Lessie* (2010) 47 Cal.4th 1152, 1162 [" '[i]f the accused indicates in any manner that he wishes to remain silent or to consult an attorney, interrogation must cease' "]; see also, e.g., *Berghuis v. Thompkins* (2010) 560 U.S. 370, 382 [an unambiguous invocation of the right to remain silent includes a suspect's statement that he "did not want to talk with the police"].) It is clear the officers understood she had invoked her right to remain silent, because, other than asking about the location of the gun used in the shooting, the officers left the room after Arnold said she did not want to talk anymore. Nevertheless, the officers re-entered and continued questioning her. And Arnold's clear invocation of her right to remain silent was not undermined by the fact that she answered the officers' additional questions. (*Smith v. Illinois* (1984) 469 U.S. 91, 100 ["an accused's *postrequest* responses to further interrogation may not be used to cast retrospective doubt on the clarity of the initial request itself"]; accord *People v. Villasenor* (2015) 242 Cal.App.4th 42, 65.)

Nevertheless, the trial court's error was harmless beyond a reasonable doubt. The entire video of the interrogation was not played for the jury. Instead, Jakub presented limited and mostly general testimony about Arnold's false carjacking story and her demeanor. Arnold told the same story before and after she invoked her right to remain silent, and this court's review of the video has confirmed Arnold's demeanor was the same before and after the invocation. On appeal, Arnold presents no argument or record citations to the contrary. Instead, she emphasizes that Jakub described instances post-invocation when she laughed and when she attempted to grab Velasquez's notes. But this court's review of the video recording reveals that Arnold laughed at various points during the questioning *before* saying she did not want to talk anymore. Thus, Jakub could have testified to her laughter even if portions of the interrogation had been excluded. Moreover, although Arnold did not attempt to grab Velasquez's notes during the pre-invocation part of the interrogation, Arnold *did* repeatedly ask who had identified her. It is clear beyond a reasonable doubt that Jakub's testimony about Arnold attempting to grab the notes did not affect the outcome of the trial.

III. *Admission of a Photograph of Arnold Holding a Gun Was Not Prejudicial*

As noted previously, appellant Arnold said during her police interrogation that she had been the victim of an armed carjacking the night of May 9, 2010. Inspector Velasquez asked her what type of gun the carjackers used and Arnold said she did not know and said "I never held a gun in my life." Later, while talking to her mother on a cell phone, Arnold said, "I ain't ever seen no gun in my life." At trial, the trial court permitted the prosecutor to introduce into evidence a photograph of Arnold "holding" a "semi-automatic pistol." In fact, the photograph is of Arnold pointing the gun at the camera with her finger on the trigger.

On appeal, Arnold contends the trial court erred in admitting the photograph because the prosecutor could not properly impeach her statements during the police interrogation that the prosecution itself offered into evidence. Respondent points out that Evidence Code sections 785 and 1202 "allow a prosecutor to use a prior inconsistent statement to partially impeach a hearsay statement the prosecutor had previously introduced." (*People v. Osorio* (2008) 165 Cal.App.4th 603, 617.)[7] On the other hand, Arnold argues this case is analogous to *People v. Fritz* (2007) 153 Cal.App.4th 949. In *Fritz*, a suspect lied to the police that he had never engaged in shoplifting. (*Id.* at pp. 954–955.) The court concluded that, because the defendant did not testify or offer into evidence his police statement, evidence the defendant had a prior theft conviction was not admissible to impeach the statement. (*Id.* at p. 955–957.) Further, *Fritz* concluded the statement was not admissible to show consciousness of guilt because the lie did not

[7] Evidence Code section 785 provides, "The credibility of a witness may be attacked or supported by any party, including the party calling him." Evidence Code section 1202 provides in relevant part, "Evidence of a statement or other conduct by a declarant that is inconsistent with a statement by such declarant received in evidence as hearsay evidence is not inadmissible for the purpose of attacking the credibility of the declarant though he is not given and has not had an opportunity to explain or to deny such inconsistent statement or other conduct. Any other evidence offered to attack or support the credibility of the declarant is admissible if it would have been admissible had the declarant been a witness at the hearing."

"relate[] directly to the crime charged—for example, a false alibi, a questionable story about how defendant came to innocently possess stolen goods, or a denial of any relationship to the victim." (*Id.* at p. 957; see also *id.* at pp. 959–960 ["a lie about one's past record may be offered by either a guilty or an innocent suspect. It indicates not that the truth about the instant case is damaging—it says absolutely nothing about the instant case—but only that the suspect fears the police will rush to judgment."].)

We need not determine whether the photograph of Arnold holding a gun should have been excluded under *Fritz* because, assuming the trial court erred, it is not reasonably probable admission of the photograph affected the outcome of the trial. (*People v. Marks* (2003) 31 Cal.4th 197, 227 ["the application of ordinary rules of evidence like Evidence Code section 352 does not implicate the federal Constitution, and thus we review allegations of error under the 'reasonable probability' standard"].) Notably, Arnold suffered essentially no additional prejudice from the jury knowing that she *lied* to the police regarding her familiarity with guns, because Arnold lied throughout the whole interrogation, most significantly about a supposed carjacking. As the evidence was overwhelming that Arnold was a liar, evidence of the additional lie was insignificant. Any prejudice to Arnold instead resulted from the jury seeing a photograph of her holding a pistol.

As to Arnold's convictions for murder and attempted murder, although the photograph may have prejudiced Arnold by making her look like someone who would commit an armed robbery, there was overwhelming evidence Arnold was a willing participant in the robbery and murders. Her counsel did not even dispute her participation, which was supported by the testimony of Medellin and Nair, evidence of her fingerprints on the white car, and jail calls in which Washington appeared to urge Arnold to recover the stolen property from a hiding place. Furthermore, there was little to no evidence supporting Arnold's claim of duress, which was the main focus of her counsel's closing argument. That claim was undermined by the lack of evidence of any threats by Washington to Arnold before the robbery, by the fact that Arnold kicked one of

the victims, by Arnold's demeanor during the police interrogation, and by the absence of corroboration in the jail calls between Arnold and Washington.

Neither was the erroneous admission of the photograph of Arnold pointing a handgun prejudicial with respect to the jury's findings on the firearm enhancements attached to the murder and attempted murder charges. The enhancements attached to the murder charges were for personal *use* of a firearm (§§ 12022.5, subd. (a) & 12022.53, subds. (b) and (g)), and Medellin was very clear that both appellants held the rifle in the course of the robbery. Although her testimony was less certain about who *fired* the rifle at the murder victims, the convictions and enhancements on the murder counts did not depend on a finding that Arnold pulled the trigger. On the other hand, the jury did find that Arnold personally discharged a firearm (§ 12022.53, subd. (c)) in committing the attempted murder. But that finding was not supported only by Medellin's tentative testimony that Arnold was the last one holding the gun before the murders. It was also supported by Medellin's testimony she ran and was fired upon after hearing Washington say, "Shoot that bitch." That statement only makes sense if Arnold was holding the gun when the statement was made. Thus, it is not reasonably probable the jury would have failed to find Arnold personally discharged the rifle in the attempted murder, even if the photograph at issue had been excluded.

IV. *No Prejudicial Error from Intoxication Instructions*

There was evidence at trial Arnold was intoxicated at the time of the underlying offenses. Medellin testified that the night of the shooting she and the appellants drove around drinking tequila. Eyewitness Nair testified that when the police brought Arnold to be identified by her, Arnold fell over while getting out of the police car, apparently drunk. The trial court instructed the jury it could consider evidence of a defendant's voluntary intoxication "only in deciding whether the defendant acted with an intent to kill or the defendant acted with premeditation and deliberation." It warned, "You may not consider evidence of voluntary intoxication for any other purpose."

On appeal, appellant Arnold contends the trial court erred in failing to instruct the jury it also could consider the evidence of intoxication in determining whether she

harbored the requisite intent to commit a robbery, and whether she had the mental state required for aiding and abetting liability. We agree the court erred. Although the trial court had "no sua sponte duty to instruct on the relevance of intoxication," because it did instruct the jury on the issue it was required to "do so correctly." (*People v. Mendoza* (1998) 18 Cal.4th 1114, 1134.) In the present case, the evidence of Arnold's intoxication was relevant not only to premeditation and intent to kill, but also the specific intent required for robbery and for aiding and abetting liability. (*People v. Lewis* (2001) 25 Cal.4th 610, 649 [application of instruction to specific intent crimes]; *Mendoza*, at p. 1133–1134 ["evidence of intoxication is admissible on the question of aider and abettor liability"].) Accordingly, the trial court erred in forbidding the jury to consider intoxication as relevant to issues other than intent to kill and premeditation.

Nevertheless, the error was harmless under any standard of review. The jury convicted Arnold of attempted murder, thereby rejecting the notion that her intoxication prevented her from forming intent to kill. Although the required intents are different, Arnold fails to explain why there is any likelihood the jury would have concluded she was *not* too intoxicated to form the intent to kill but she *was* too intoxicated to form the intent to permanently deprive the victims of their property, or to aid and abet Washington. Moreover, there was no evidence of the degree of Arnold's intoxication at the time of the robbery and shooting; the only evidence was of her intoxication later after she had been arrested and taken to be identified. Finally, Arnold's counsel did not even rely on a claim of voluntary intoxication in his closing argument, and there is no reason to believe the jury would have focused on the issue if the instruction had been broader. Any error as to the voluntary intoxication instruction was harmless.[8]

[8] Appellant Washington joins appellant Arnold's argument based on the voluntary intoxication instruction. However, he points to no evidence in the record regarding the degree of his intoxication the night of the shooting. Instead, he merely speculates that he and Arnold drank similar quantities and were affected similarly. Absent actual evidence of his intoxication, there is no basis to conclude a jury would have found intoxication

V. *Appellants Have Not Shown the State of the Record Provides a Basis for Reversal*

Appellant Arnold points out that clerks from the Alameda County Superior Court certified they cannot locate several documents, including: (1) juror questionnaires filled out by two prospective jurors; (2) the written instructions given to the jury; (3) the verdict forms for Arnold signed by the jury, as well as the unused verdict forms; and (4) juror notes submitted to the court during trial. Arnold contends reversal is required because, without those materials, "the record on appeal is inadequate for a meaningful and effective appellate review." Appellant Washington joins the argument and points out the typed transcript of the May 26, 2010 police questioning of Medellin is also missing. Appellants have not demonstrated a basis to reverse the judgment.

"A criminal defendant is entitled under the Eighth and Fourteenth Amendments to an appellate record that is adequate to permit meaningful review. [Citations.] An appellate record is inadequate 'only if the complained-of deficiency is prejudicial to the defendant's ability to prosecute his appeal.' [Citation.] The defendant bears the burden of demonstrating that the record is not adequate to permit meaningful appellate review. [Citation.] Inconsequential inaccuracies or omissions are insufficient to demonstrate prejudice. [Citation.] If the record can be reconstructed with other methods, such as 'settled statement' procedures [citations], the defendant must employ such methods to obtain appellate review." (*People v. Young* (2005) 34 Cal.4th 1149, 1170; see also *People v. Samayoa* (1997) 15 Cal.4th 795, 820 ["No presumption of prejudice arises from the absence of materials from the appellate record"].)

In the present case, appellant Arnold asserts the missing documents have "left a substantial void in the record, making a meaningful and effective appellate review unavailing." She speculates the missing juror questionnaires "might have included" information relevant to the court's decision to excuse them. She speculates the trial court might have departed from the agreed upon jury instructions or the written instructions

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affected his ability to form the intents required to support the convictions for the charged offenses.

might have been materially different from the oral instructions. She speculates the missing verdict forms and jury notes might disclose hidden errors. Appellant Washington engages in similar speculation.[9]

We find it concerning so many portions of the record are missing, and we urge the trial court to examine and address whatever mistakes led to the loss of the materials identified by appellants. But appellants have not shown any basis to reverse the judgment. The following reasoning from the Supreme Court's decision in *People v. Young* is directly applicable to this case: "In essence, defendant argues that merely showing that the missing material may have contained matter that demonstrated error or reflected a constitutional violation satisfies his burden of establishing prejudice. But this amounts to nothing more than speculation, which is insufficient." (*People v. Young*, *supra*, 34 Cal.4th at p. 1170.) We reject appellants' claim of error based on the state of the record.

VI. *We Remand for Consideration of Striking Firearm Enhancements*

The trial court imposed two consecutive ten-year sentence enhancements on counts one and two under section 12022.53, subdivision (b), and a consecutive 20-year enhancement on count three under section 12022.53, subdivision (c). At the time of sentencing, firearm enhancements under section 12022.53 were mandatory and could not be stricken in the interests of justice. (See former § 12022.53, subd. (h); *People v. Felix* (2003) 108 Cal.App.4th 994, 999.)

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[9] In appellant Washington's reply brief he makes reference to a purported conflict between the court clerk's minutes and the reporter's transcript as to whether on count three appellants were convicted of *both* attempted murder and assault with a deadly weapon, or only attempted murder. The minutes reference both offenses, while the transcript states appellants were convicted of attempted murder but does not mention the lesser included offense. Washington provides no authority supporting his assertion that the verdicts would be "inconsistent" if the jury rendered unnecessary findings of guilt on the lesser included offense. (Cf. *People v. Keating* (1981) 118 Cal.App.3d 172, 181 ["the jury presented the court with signed and dated verdict forms of both guilty and not guilty as to each count and both true and not true as to each special allegation"].)

On October 11, 2017, the Governor signed Senate Bill 620. Effective January 1, 2018, the bill amended section 12022.53, subdivision (h), to state, "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." (Stats. 2017, ch. 682, § 2.) Appellant Arnold argues the amendment requires a remand for resentencing so the trial court can consider whether to exercise its newly-granted discretion to strike the three firearm enhancements imposed on her.

Respondent agrees that the amendment to Penal Code section 12022.53, should be applied retroactively to cases not final on appeal, under *In re Estrada* (1965) 63 Cal.2d 740, 746–748. (See also *People v. McDaniels* (2018) 22 Cal.App.5th 420, 424–425.) Given Arnold's age at the time of the offense, there is no basis to conclude a remand to allow the trial court to exercise its discretion would be an " 'idle act.' " (*People v. Gamble* (2008) 164 Cal.App.4th 891, 901.) This is not a case in which " 'the record shows the trial court would not have exercised its discretion even if it believed it could do so.' " (*Ibid.*; see also *McDaniels*, at p. 425 ["a remand is required unless the record shows that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken a firearm enhancement"].)

DISPOSITION

The trial court's judgment is affirmed as to appellant Washington. As to appellant Arnold, her convictions are affirmed, but the case is remanded for the trial court to consider whether to strike the three firearm enhancements imposed under section 12022.53, subdivisions (b) and (c).

SIMONS, J.

We concur.

JONES, P.J.

BRUINIERS, J.

(A146433)